In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-737

RICHARD HONGISTO, ETC., ET AL.	*Petitioner*
v.	
FRANZ GLEN and GEORGE EVANKOVICH	*Respondent*
RICHARD HONGISTO, ETC., ET AL.	*Petitioner*
v.	
JOSEPH P. MAZZOLA	*Respondent*
RICHARD HONGISTO, ETC., ET AL.	*Petitioner*
v.	
FRANZ GLEN	*Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

Respondent's Brief in Opposition

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INDEX

	Page
Table of Authorities	i
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions	2
Statement of the Case	3
Reasons Why the Writ Should be Denied	4
Conclusion	11
Appendix, Exhibit A	12

TABLE OF AUTHORITIES

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) reh den (US) 434 U.S. 881 8
Bigelow v. Virginia, 421 U.S. 809 (1975) 7, 8
Brandenburg v. Ohio, 395 U.S. 444 v. (1969) 4, 5, 8, 9
Brides v. California, 314 U.S. 251 (1941) 8
Cafeteria Employers v. Angelos, 320 U.S. 293 (1943) .. 8
Carey v. Population Services Internation., 431 U.S. 678 (1977) 8
Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949) ...7, 9, 10
Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977) 8
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) .. 5, 7
Pittsburg Press Co. v. Human Relations Commission, et al., 413 U.S. 376 (1973) 4, 5, 6, 8
Senn v. Tile Layers Protective Union, 301 U.S. 468 (1936) 7
Street v. New York, 394 U.S. 576 (1969) 10
Thomas v. Collins, 323 U.S. 516 (1944) 8
Thornhill v. Alabama, 310 U.S. 88 (1940) 7
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 8
Glen v. Hongisto, 383 F. Supp 10 (N.D.C.A. 1977) 4, 6, 7, 9, 10

CALIFORNIA LAW

U.F.W. v. Superior Court, 14 Cal. 3rd. 902 (1975) 8

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Respondent's Brief in Opposition

The respondent, Joseph P. Mazzola, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, rendered in these proceedings on July 19, 1978.

OPINIONS BELOW

The order of the Court of Appeals denying rehearing is attached to the petition for a writ of certiorari as

Exhibit A. The opinion of the Court of Appeals affirming the District Court is attached to the petition for a writ of certiorari as Exhibit B. The opinion of the District Court is attached to the petition for a writ of certiorari as Exhibit C.

JURISDICTION

The order of the Court of Appeals denying rehearing was entered on July 19, 1978. The petition for certiorari was filed fewer than 90 days from the date aforesaid. The jurisdiction of this Court is involved under 28 U.S.C. section 1254.

QUESTIONS PRESENTED

The Circuit Court of Appeals for the Ninth Circuit affirmed the holding of the District Court that an injunction of a California State Superior Court, applied against a newspaper advertisement placed by respondent concerning a strike of public employees, was not constitutionally valid pursuant to the First Amendment of the United States Constitution.

The single question presented is:

1. Was the Circuit Court of Appeals clearly erroneous in its determination that the newspaper advertisement was constitutionally-protected speech?

CONSTITUTIONAL PROVISIONS

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." First Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner Richard Hongisto was at relevant times herein the Sheriff of the County of San Francisco. Petitioner Clayton Horn was at relevant times herein Judge of the Superior Court for the State of California for the City and County of San Francisco. Respondents are local union officers of unions representing certain employees of the City and County of San Francisco. On April 12, 1976, petitioner Clayton Horn of the Superior Court, after hearing evidence of respondents' conduct related to a strike against the City and County of San Francisco, issued a preliminary injunction providing in part as follows:

> "IT IS ORDERED that, during the pendency of this action, said defendants are enjoined and prohibited from:
>
> "1. Striking, or calling or inducing or giving notice of a strike, against the plaintiff, City and County of San Francisco; . . ."

A few days later, on April 15th and 19th, the superior court issued orders to show cause in re contempt for violation of the injunction. After six days of hearings, respondents were adjudged in contempt of the superior court. The superior court found that a strike had been called by the respondents and others against the City and County of San Francisco on March 31, 1976, and that it had continued through April, 1976. As to the respondents, the court found that each had

violated the injunction by authorizing the publication of a newspaper advertisement which stated that the strike could be settled only through negotiations. The full text of said advertisement is set forth in the opinion of the District Court, 438 F. Supp. 10, at 12 note 2, (Exhibit C to the petition for writ of certiorari, and Exhibit A herein).

At oral argument before the District Court, petitioner conceded that the contempt judgments of the state superior court could not be sustained if the superior court's injunction was found to be invalid.

The District Court held that as applied to the advertisement, the injunction violated respondent's first amendment rights under *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The Court of Appeals for the Ninth Circuit affirmed on this ground and for the reasons set forth in the District Court's opinion.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The decision below, which granted first amendment protections to the publication of an advertisement by labor leaders concerning a labor dispute, is not in conflict with this Court's decision in *Pittsburgh Press Co. v. Human Relations Commission, et al.*, 413 U.S. 376 (1973).

Petitioner's application for the writ of certiorari asserts that public employee strikes are illegal under California law and that an advertisement in support of unlawful conduct is not protected by the First Amendment. As authority for the latter proposition of law petitioner cites this Court's holding in *Pittsburg Press v. Human Relations Commission et al.*, 413 U.S. 376 (1973). Petitioner concludes that the advertisement

in this case, which concerned a public employees strike, was not protected by the First Amendment.

Application of *Pittsburg Press*, *id.*, to the non-commercial advertisement in the present case so as to strip respondents' advertisement of first amendment protections would render completely inoperative the holding of this Court in *Pittsburg Press*, *id.*, that first amendment protections *do* attach to the very type of advertisement published by respondents in this case.

In holding that the advertisement before the Court in *Pittsburgh Press* was not protected by the First Amendment, and therefore subject to a local ordinance's prohibition against sex discrimination, the Court explicitly distinguished the Commercial ad before it from an advertisement which ". . . 'communicated information, expressed opinion, recited grievances, protected claimed abuses . . .' " *Pittsburg Press id.*, at 385, quoting from *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

Pittsburg Press was explicitly limited to ads which "did no more than propose a commercial transaction," *id.*, at 385, and was never meant to apply to non-commercial ads such as in the instant case. The Court in *Pittsburg Press* made it clear that a non-commercial ad was entitled to full constitutional protection.

The decision of the Ninth Circuit below,[1] affirming the District Court's holding that the injunction in the present case, as applied to the advertisement, violated respondents' first amendment rights under *Branden-*

1 Reproduced as Exhibit B in the Petition for a writ of certiorari.

burg v. Ohio, 395 U.S. 444 (1969), was based on the grounds and reasons set forth in the opinion of the District Court.[2]

The District Court's application of the *Brandenburg* standards to the ad purchased by respondents was premised on the finding that "the advertisement at issue was of a non-commercial nature" *Glen v. Hongisto*, 438 F. Supp. 10 at 15, n.7 (N.D. CA 1977). The District Court criticized the California State Superior Court's characterization of the ad in the contempt proceedings:

"The advertisement here in question simply urged the Board of Supervisors to negotiate by engaging in collective bargaining. The finding that it was a 'horatory declamation . . . abetting and advising disregard for court orders and escalation of strike effects,' is questionable at best." *Glen v. Hongisto, supra*, at 18.

Petitioner's reliance on *Pittsburg Press* for the stated proposition that advertisements in support of unlawful conduct are not protected by the First Amendment is erroneous because the Court in *Pittsburg Press* drew a careful distinction between commercial advertisements lacking first amendment protections, and non-commercial ads, as the ad in question, which are accorded first amendment status. The District Court's finding, adopted by the Ninth Circuit, that the ad in question was directed at influencing the Board of Supervisors on an issue of public importance, and not commercial speech, places the decision below in full

2 Reproduced as Exhibit C in the Petition for a writ of certiorari.

accord with the decision in *Pittsburg Press*. Moreover, the district court's finding with respect to the nature of the ad in question, which received the concurrence of the Ninth Circuit, clearly is not a "very obvious and exceptional error." *Graver Mfg. Co. v. Linde Co.* 336 U.S. 271, 275 (1949).

This Court has established that speech is not rendered commercial by the mere fact that it relates to an advertisement. *New York Times v. Sullivan, supra*, at 266; *Bigelow v. Virginia*, 421 U.S. 809, 820-21 (1975). The contents of an advertisement, then, not the fact that it was paid for, are determinative of its commercial character.

The full text of the advertisement placed by respondent in a local newspaper is reproduced as a footnote to the opinion of the District Court. *Glen v. Hongisto, supra* at 12, note 2.[3] It is clear from the text of the ad that respondents endeavored to address a message to the Board of Supervisors of the City and County of San Francisco and the general public concerning the issues underlying the labor dispute and the need for collective bargaining to resolve an impasse between the two sides.

The contents of the ad are obviously communicative in nature, "pure speech," and well within the first amendment guarantees of free speech and the right to open and far-reaching discussion and publicity of the issues involved in a labor dispute. *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 478 (1936); *Thornhill*

3 The text of the Ad, as reproduced in the opinion of the District Court, is set forth as Exhibit A of the Appendix to this brief in opposition.

v. Alabama, 310 U.S. 88 (1940); *Bridges v. California*, 314 U.S. 251 (1941); *Cafeteria Employers v. Angelos*, 320 U.S. 293, 295 (1943); *Thomas v. Collins*, 323 U.S. 516 (1944); *U.F.W. v. Superior Court*, 4 Cal. 3d. 902, 910-912 (1975).

2. This Court's holding in *Pittsburg Press* does not preclude the attachment of first amendment protections to respondents' advertisement in light of recent decisions of this Court.

Even if it is assumed, *arguendo*, that the advertisement placed by respondent in a local newspaper fell within the class of commercial advertisements recognized in *Pittsburg Press*, to which first amendment protections do not apply, recent decisions of this Court have explicitly rejected the "commercial speech" exception to the First Amendment and have extended first amendment protections to even purely commercial advertising. *Biglow v. Virginia*, 421 U.S. 809 (1975), *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977); *Carey v. Population Services International*, 431 U.S. 678, (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); reh. den. (U.S.) 434 U.S. 881.

In *Carey v. Population Services International, supra*, at 701, this Court explicitly applied the *Brandenburg* test to commercial advertisements. In striking down a prohibition of advertisements of the sale of contraceptives, the Court held that "none of the advertisements in question can even remotely be characterized as 'directed to inciting or producing imminent or lawless

action and likely to incite or produce such action.' *Brandenburg v. Ohio . . .*" *Carey, id.*

3. The decision below correctly applied the Constitutional standard of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), to the content of respondent's advertisement.

Notwithstanding its reservations about the State Court's characterization of the ad, the District Court assumed that the finding of the Superior Court of the State of California was supported by the evidence. The Court went on to conclude:

> "(respondent's) publication may reasonably be seen as mere advocacy of lawlessness. At most, it can be viewed as directed toward producing imminent lawless action. In either case, the *Brandenburg* standard is not met as the finding makes no mention of the likelihood that the publication would effect the result supposedly intended, nor does the record indicate such likelihood." *Glen v. Hongisto, supra*, at 18.

The District Court, with the concurrence of the Ninth Circuit, properly applied the two *Brandenburg* requirements that advocacy of use of force or law violation be "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," in order to lose its protected character. *Brandenburg, supra*, at 447. Even a cursory reading of respondents' publication demonstrates that the court was not "clearly erroneous" in its application of the *Brandenburg* standards to the contents of respondents' advertisement. *Graver Mfg. Co. v. Linde Co., supra.*

An important part of the instant advertisement is purely informational, reporting that the Mayor, and

"other top city brass," were being given substantial raises while protesting craft workers were subjected to pay cuts of equal amounts.

The advertisement's protests of the Board of Supervisors' then stated intention to submit the details of craft pay cuts to direct voter action was directed against pending legislation, and was protected speech for that reason regardless of the charged public labor context in which it arose. *Street v. New York*, 394 U.S. 576, 591 (1969).

Finally, the advertisement seeks to marshall public opinion in favor of the proposition that the Board of Supervisors should negotiate with the labor representatives over the various wage issues underlying the present dispute. The banner of the advertisement states:

"Negotiate — Now!"

Clearly, the advertisement was directed at public opinion and the Board of Supervisors with the intent of producing "intensive, around-the-clock-negotiations"—as noted in the advertisement's concluding language, not "imminent lawless action" within the meaning of *Brandenburg*. While it may be reasonably doubted that the ad would be successful in its intended effect, to induce negotiations, there is no basis whatsoever to conclude that the two courts below were in "obvious and exceptional error," *Graver Mfg. Co. v. Linde Co.*, *supra*, in finding that there was no likelihood that the advertisement would effect the supposedly intended unlawful action. *Glen v. Hongisto*, *supra*, at 18.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Dated: January 9, 1979

Respectfully submitted,

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EXHIBIT A

The full text of the instant advertisement, as it appeared in the opinion of the District Court, *Glen v. Hongisto*, 438 F. Supp. 10, at 12, note 2, (N.D. CA 1977) read as follows:

"NEGOTIATE - NOW

"State law declares it.

"City ordinance requires it.

"Good sense demands it.

"The only way to end this impasse is through hard, determined, around-the-clock, good-faith negotiations.

"The Board of Supervisors is charged under state law and city ordinance to set city pay by collective bargaining.

"For weeks now, it has ducked that responsibility. It reneged on an understanding reached with its negotiator. It refused to discuss economic issues of any kind. Now it is trying to impose its own solution on us by another kind of political club—ballot propositions.

"None of these devices has anything to do with the issues. None of them can settle the strike.

"Only negotiations. Intensive, good faith, around-the-clock negotiations.

"Federal mediation can get talks started and help keep them going. We're willing—but not under terms that demand our "unconditional surrender."

"No strings. Just plain collective bargaining.

"We're ready—on an hour's notice.

"Striking City Employees

"Strike headquarters 1623½ Market Street, San Francisco

"Pay cuts

"That's what this
"strike's all about

"The Supervisors demand that we take pay cuts ranging from $2,700 to $5,000 a year and more.

"Mayor Moscone gets a raise of $3,030 a year. Other top city brass get raises of $3,000 to $5,000 a year. Living costs continue to rise. Other workers' living standards go up. But we're told—not asked—to take a cut in pay.

"To enforce its demand, the Board has totally denied us the good-faith collective bargaining promised us in state law and city ordinance.

"Instead, it enacted its unilateral proposal into law —without negotiations. It refused to discuss any economic issues. It has hidden behind its own ordinance cutting off itself—and the mayor—from face-to-face talks.

"Now it proposes to put the 'issues' on the ballot. It does not make sense. How can you set pay scales for 303 job classifications by popular vote? How can you meet the city charter's requirement of "comparable pay for comparable work?" How do you fulfill the legal responsibility for collective bargaining by putting it on the ballot?

"Intensive, around-the-clock negotiations are the only answer—the only way out.

"Why must we wait any longer?

"published by the

"JOINT NEGOTIATING COMMITTEE

"Joseph O'Sullivan
"Carpenters, Local 22
"George Evankovich
"Laborers, Local 261
"Franz E. Glen
"Electricians, Local 6
"Joseph P. Mazzola
"Plumbers & Pipefitters, Local 38
"Stanley Jensen
"Machinists, District Lodge 115
"Stanley M. Smith
"San Francisco Building &
"Construction Trades Council.

"Our strike is endorsed by the San Francisco Labor Council; AFL-CIO, SF Building & Construction Trades Council; Bay Cities Metal Trades; Joint Council of Teamsters, ILWU . . ."